Jurisdictional Statement

JAN. 5, 1982
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SUPREME COURT U.S.

No. 81-6012

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RICHARD A. CEPULONIS,
Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,
Appellee.

On Appeal From The Supreme Judicial Court
Of The Commonwealth of Massachusetts

JURISDICTIONAL STATEMENT

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RICHARD A. CEPULONIS,
Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,
Appellee.

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Question Presented

Whether Massachusetts General Laws c. 269 §10, which permits a sentence of life imprisonment for simple possession of a machine gun and under which appellant was sentenced to a term of forty to fifty years, violates the Eighth Amendment to the Constitution of the United States, on its face and as applied.

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Opinions Below

The decision of the Supreme Judicial Court of the Commonwealth of Massachusetts affirming appellant's conviction on direct appeal is reported at 374 Mass. 487, 373 N.E.2d 1136 (1978). The decision of that Court affirming appellant's sentence on a Petition for a Writ of Error, the judgment from which the present appeal is taken, is reported at 1981 Mass.Adv.Sh. 2089, ___ N.E.2d ___ (1981).

Jurisdiction Of This Court

After his conviction was affirmed by the Supreme Judicial Court on direct appeal, appellant filed a Petition for a Writ of Error in the Supreme Judicial Court raising the claim that the forty to fifty year sentence imposed upon him under Massachusetts General Laws c. 269 §10 for simple possession of a machine gun violated the Eighth Amendment to the Constitution of the United States. Appellant challenged the statute on its face and as applied. Argument was heard by a single justice, who reserved decision and reported the case to the full court for decision. On October 8, 1981, the full court affirmed appellant's sentence. Rescript issued on November 5, 1981 and judgment was entered on November 25, 1981. On December 21, 1981, a Notice of Appeal to this Court was filed in the Supreme Judicial Court of Massachusetts.

Jurisdiction of this Appeal is conferred by 28 U.S.C. §1257(2).

Constitutional Provisions and Statutes Involved

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Massachusetts General Laws c. 269 §10 [now c. 269 §10(c)] provides (in relevant part):

> Whoever, except as provided by law, possesses a shotgun with a barrel less than eighteen inches in length, or possesses a machine gun, as defined in section one hundred and twenty-one of chapter one hundred and forty, without permission under section one hundred and thirty-one of said chapter, shall be punished by imprisonment in the state prison for life or for any term of years.

Statement Of The Case

In August of 1973, three men held up a bank in Woburn, Massachusetts and escaped by car. In the course of a police chase through the streets of Woburn, a machine gun was fired from the fleeing car injuring the driver of another vehicle. Appellant was charged in both state and federal courts with several offenses arising out of these events. He was first tried and convicted on the federal bank robbery charges and sentenced to a term of twenty-five years. In the state court, appellant was convicted of a violation of M.G.L. c. 269 §10, possession of a machine gun, and it is the sentence of forty to fifty years in state prison imposed on that charge as well as the life sentence authorized by the statute which are challenged as cruel and unusual punishments which violate the Eighth Amendment. In the same state proceeding, appellant was also convicted of three counts of assault with a dangerous weapon against the police officer and the bystander (two counts of assault with a

dangerous weapon with intent to murder and one count of assault and battery with a dangerous weapon). He received the statutory maximum term of eighteen to twenty years and eight to ten years for those offenses, to run concurrently with the sentence on the charge of possession of a machine gun. All of the sentences imposed on the four state charges are to run consecutively to sentences previously imposed on the federal charges, so that the ten to twenty year terms on the assault charges and the forty to fifty year term on the charge of possession of a machine gun will not begin to run until approximately 1983.*

Appellant's sentences were imposed on May 24, 1976. His sentencing appeal to the Appellate Division of the Superior Court was dismissed on November 18, 1976. On February 24, 1978, his conviction was affirmed on direct appeal by the Supreme Judicial Court. Appointed counsel did not raise a constitutional challenge under the Eighth Amendment to the forty to fifty year sentence in either of those courts. However, by a pro se writ of error filed afterward in the Supreme Judicial Court, petitioner did raise the constitutional challenge to his sentence and the statute under which it was imposed.** Counsel was appointed and the case was heard before a single justice of the Supreme Judicial Court who reserved decision and reported the case to the full court for decision.

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* 1989 is appellant's likely parole date from the sentence imposed on the federal conviction.

** Appellant also raised a claim that he was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments and cognate provisions of the Massachusetts Declaration of Rights, as well as a claim that imposition of sentence on the charge of possession of a machine gun as well as on the various charges of assault with a deadly weapon violated the constitutional protection against double jeopardy under the Fifth and Fourteenth Amendments to the Federal Constitution. These claims were also rejected by the state court.

The case was heard by the full court on an agreed statement of facts,* and the Court again affirmed appellant's conviction, rejecting the claim that his forty to fifty year sentence constituted cruel and unusual punishment. Cepulonis v. Commonwealth, 1981 Mass.Adv.Sh. 2089, 2090, ___ N.E.2d ___ (1981). The Supreme Judicial Court ruled only on the validity of the weapons statute as applied to appellant, holding that he had no standing to challenge the term of life imprisonment authorized by the face of the statute. Id., at p. 2090, n. 1.

While noting that language in this Court's decision in Rummel v. Estelle, 445 U.S. 263 (1980) arguably eliminated the need to apply the three-pronged test of proportionality traditionally used in analyzing whether a punishment is unconstitutionally cruel and unusual, the Supreme Judicial Court nonetheless applied the proportionality test since it is also applicable under Article 26 of the Massachusetts Declaration of Rights. Id., at 2090-2091, n. 2. Under the tripartite analysis of proportionality, the Supreme Judicial Court found that appellant's sentence could not be considered so disproportionate to the offense of possession of a machine gun as to constitute cruel and unusual punishment. First, examining the "nature of the offense and the offender in light of the degree of harm to society," the court below found that harm to be so grave in a case involving possession of a machine gun that a forty to fifty year sentence was not dispro-

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* There were two errors in the agreed statement of facts which was originally submitted by the parties. The fact that appellant received sentences of eighteen to twenty years on the two charges of assault with a dangerous weapon with intent to murder was inadvertently omitted, although the sentences are apparent from the mittimus on those charges which also formed part of the record. In addition, the statement of agreed facts stated, incorrectly, that the police officer and the bystander had both been injured. The fact that only the bystander was hurt was clarified in appellant's reply brief, with the agreement of the Commonwealth.

portionate. Id., at 2091-2092. Similarly, the Supreme Judicial Court reasoned that although this sentence was much more severe than those imposed for many crimes involving actual harm to persons, it could not be found disproportionate, since the Legislature could reasonably conclude that harsh sentences for possession of a machine gun are necessary to prevent its use. Id., at 2092. Finally, the Court found that the difference in severity between the sentence imposed here and the penalties available in other states for the same or similar crimes was only one of degree. Id., at 2092-2093.

The Court below also examined the question of proportionality under the second test of constitutional excessiveness enunciated by this Court in Coker v. Georgia, 433 U.S. 584, 592 (1977), holding that a sentence may be found unconstitutionally excessive because it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering," as well as because it is grossly disproportionate to the crime. Id., at 2093. Relying on a standard of a "reasonable relation" between a challenged sentence and a permissible legislative objective, the Supreme Judicial Court found it could not say that the legislature or the sentencing judge was in error in concluding that a forty to fifty year sentence promoted the usual goals of sentencing, i.e., deterrence, isolation and incapacitation, retribution and moral reinforcement, and reformation. Ibid. Therefore, the court ruled that appellant had not met the burden of showing his sentence to be unreasonable. Id., at 2093.

The court below did not specifically address the question of justification for such a large increment of punishment over the sentences authorized by M.G.L. c. 269 §10(a) for possession of handguns or by M.G.L. c. 265 §15A and c. 265 §18 for the

assaultive use of weapons. The Supreme Judicial Court also did not address the question of whether or how the Eighth Amendment analysis should be affected by the fact that appellant was also sentenced to the maximum statutory terms for the assaults in which the machine gun was used.

Reasons Why The Question Is Substantial

The decisions of this Court which have articulated the meaning of the Eighth Amendment have focused upon capital punishment and the incidents of confinement. There have been few occasions on which this Court has addressed itself to the question of what limitations the Eighth Amendment imposes on the duration of confinement, or has analyzed the standards which govern the determination that those limits have been exceeded. See, Mr. Justice Powell's dissent in Rummel v. Estelle, 445 U.S. 263, 290, n. 7 (1980). What little illumination had been shed on this subject in this Court's earlier decisions has recently been obscured by the opinions in Rummel v. Estelle, both the narrow majority which suggests, at 445 U.S. 274, that the standard which has traditionally governed the inquiry into the constitutionality of punishment is no longer applicable to a term of imprisonment, and the dissent, which finds such an analysis applicable in general and in Rummel's case, in particular. 445 U.S. at 293.

Nearly a century ago, Mr. Justice Field stated in dissent in O'Neil v. Vermont, 144 U.S. 323, 340 (1892), that the Eighth Amendment was intended to reach punishments whose excessive length is disproportionate to the offense.* The principle that dispro-

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* The majority in O'Neil v. Vermont did not reach the question, on the ground that it was neither properly preserved nor properly presented since at that time the Bill of Rights had not been found applicable to the states. Id., at 331-332.

portionate sentences constitute cruel and unusual punishments was later held to be a correct assessment of the Constitution's meaning in Weems v. United States, 217 U.S. 349, 371, 377 (1909). In Weems v. United States, this Court relied on three objective indicators of the proportionality of an offense -- the nature of the offense and the purposes served by the statutes defining it, the severity of the punishment in comparison to punishments imposed for similar crimes in other jurisdictions and in comparison to punishments imposed for other crimes in the same jurisdiction. Id., at 217 U.S. 363-364, 380-382.

Although no case in this Court has found a sentence to a term of years without more to be unconstitutionally disproportionate, the application of the principle of proportionality to all forms of punishment had not, until Rummel v. Estelle, been questioned. The majority opinion in Rummel v. Estelle, 445 U.S. at 274, appears to state that the principle of proportionality is applicable only in the death penalty context and that defining the permissible duration of a term of imprisonment is a matter wholly within the discretion of state legislatures. The implication seems to be that the constitutionality of such a punishment is not, as a rule, reviewable by the Supreme Court. Id., at 274. However, the opinion is not unequivocal and could well be regarded as dictum or as the expression of a presumption that state legislative judgments as to the appropriate length of sentences reflect a proper proportion between punishment and offense, in the absence of a showing that a particular legislative decision is far out of line with contemporary standards, a showing which Rummel failed to make.

These uncertainties have resulted in discernible confusion in the lower courts, most noticeably in the Fourth Circuit, which had, until Rummel v. Estelle, the most well-developed law in this

area. See, e.g., Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 983 (1974); Roberts v. Collins, 544 F.2d 168 (4th Cir. 1976), cert. denied, 430 U.S. 973 (1977). Thus, the Fourth Circuit, sitting en banc in Davis v. Davis, 646 F.2d 123 (1981) petition for certiorari filed sub nom. Hutto v. Davis, No. 81-23 (Supreme Court, July 2, 1981) 50 L.W. 3009, divided evenly over the question of whether, after Rummel v. Estelle, a district court ruling which had been affirmed in a previous en banc decision* should again be affirmed. The earlier en banc opinion had found, with the district court, that two consecutive sentences totalling forty years for possession of nine ounces of marijuana with intent to distribute were so disproportionate to the offenses as to constitute cruel and unusual punishment. A panel decision of the Fourth Circuit, Jones v. Purvis, 646 F.2d 127 (1981), issued on the same day as the final ruling in Davis v. Davis, noted with evident relief that the sentence in issue there was so clearly within constitutional limits as to require no analysis of the impact of Rummel v. Estelle on that circuit's earlier precedents.

Some state courts, as Massachusetts has in this case and as West Virginia has in Wanstreet v. Bordenkircher, 276 S.E.2d 205, 209-210 (W.Va., 1981), have taken Rummel v. Estelle as signifying a functional abandonment of proportionality as the constitutional standard outside of the death penalty cases. The Fifth Circuit has taken yet another view, that Rummel v. Estelle simply limits proportionality analysis to the question of whether the challenged punishment serves a substantial state interest. Terrebonne v. Blackburn, 646 F.2d 997, 1002-1003 (1981) (en banc); Francioni v.

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* Davis v. Davis, 601 F.2d 153 (1979), cert. granted, vacated and remanded sub nom. Davis v. Hutto, for further consideration in light of Rummel v. Estelle, 445 U.S. 263 (1980), 445 U.S. 947 (1980).

Wainwright, 650 G.3d 590, 592 (1981).*

Thus, Rummel v. Estelle raises and leaves unanswered questions which are undeniably fundamental to Eighth Amendment jurisprudence: Does the principle that punishment must be proportioned to the offense apply, under the Eighth Amendment, to sentences of imprisonment as well as to the ultimate punishment of death? The answer to this question is, of course, of profound significance, since the notion of "just deserts" has, heretofore, provided the keystone of society's justification for imposing criminal punishments as well as the touchstone for constitutional analysis of the limits on punishment. See, Mr. Justice Powell's dissent in Rummel v. Estelle, 445 U.S. at 288-290; Wanstreet v. Bordenkircher, 276 S.E.2d at 214. See generally, Note, Disproportionality in Sentence of Imprisonment, 79 Columbia L.Rev. 1119 (1979); R. Nozick, Philosophical Investigations, pp. 363-397 (1981). If the Eighth Amendment does not embody this fundamental notion and punishments may, constitutionally, be imposed for purely utilitarian purposes such as deterrence and isolation without regard to the degree of moral culpability of the offender, then such a radical shift in the philosophical foundations of our criminal justice system should be more clearly signalled and its implications more clearly defined than was done in Rummel v. Estelle.

On the other hand, if, as seems more likely, Rummel v. Estelle leaves open the possibility that proportionality is indeed ultimately determinative of what constitutes cruel and unusual punishments under the Eighth Amendment, but the legislative judgment as to what is proportional is seldom to be judicially questioned where a punishment short of death is involved, then

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* Rummel v. Estelle itself does not appear to place any specific label on the type of state interests which it discusses as the principle justification for the ruling against Rummel.

the question of how to identify those cases or circumstances in which proportionality can be examined by the courts should be answered. The further question then arises of what standards should be applied to determine if a punishment is disproportionate to the offense -- the three objective factors identified in Weems v. United States, or the single factor of a substantial state purpose which the Fifth Circuit has concluded is the sole litmus under Rummel v. Estelle? Finally, what is the role, after Rummel v. Estelle, of the other measure of constitutional excessiveness articulated in Coker v. Georgia, 433 U.S. 584, 592 (1977), i.e., whether a sentence makes "no measurable contribution to acceptable goals of punishment"?

This case presents these questions in a highly focused factual context which permits clear elucidation of the relevant standards, since the state statute permits imposition of a grossly longer sentence for possession of a weapon than for its use and sentences were imposed on appellant for both use and possession in the course of the same transaction. The decision of the Massachusetts Supreme Judicial Court exemplifies the need for guidance from this Court on the precise parameters of the Eighth Amendment as applied to a sentence to imprisonment for a term of years. Throwing up its hands at the prospect of determining whether or how proportionality analysis still applies under Rummel v. Estelle, 1981 Mass.Adv.Sh. at 2090-2091, n. 2, the Supreme Judicial Court applied the traditional three-pronged test of proportionality both as a precaution and because it was applicable in any event under the state constitution, but applied it incorrectly, as will be discussed below. It is not unreasonable to suppose that guidance from this Court more recent than Weems v.

United States* and more clear than Rummel v. Estelle might have resulted in a more rigorous treatment of the relevant considerations.

Assuming that the questions of whether and when the principle of proportionality governs the constitutional inquiry and if so, whether the Weems v. United States approach to evaluating proportionality is still appropriate in those rare instances are answered in the affirmative, one of the more significant defects in the constitutional reasoning of the Supreme Judicial Court in this case lies in its cursory treatment of the two types of comparative analysis required by Weems v. United States.** Although it is not apparent from the Supreme Judicial Court opinion, this case, unlike Rummel v. Estelle, (see, 445 U.S. at 279) presents distinctions between the sentences imposed and imposable under the Massachusetts statute and the sentences authorized for similar crimes in other jurisdictions which are gross rather than subtle.

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* Rummel v. Estelle does make clear at 445 U.S. at 274, that the death penalty cases are sufficiently sui generis to provide little or no guidance as to how proportionality analysis, if applicable at all, is to be applied outside the death penalty context and hence, Weems v. United States is one of the very few relevant cases.

** A threshold problem with the lower court's decision is, of course, its ruling that appellant lacks standing to challenge the statute on its face as well as applied (1981 Mass.Adv.Sh. at 2090, n. 1). This ruling seems clearly wrong, since this case is the converse of United States v. Raines, 362 U.S. 17, 21 (1960), cited by the Supreme Judicial Court in support of its ruling, since the statute challenged on its face in Raines was clearly constitutionally applied to those raising the challenge. Here, in contrast, appellant challenges the statute as applied to him and, a fortiori, on its face. See, In Re Lynch, 8 Cal.3d 410, 105 Cal.Rptr. 217, 583 P.2d 921, 936 (1972) (en banc) explicitly finding standing to challenge the face of a statute in similar circumstances and Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981) which implicitly finds standing to challenge the face of the statute.

A survey of the fifty states and the District of Columbia demonstrates that only a small fraction of other jurisdictions impose penalties which even begin to approach the sentences available under c. 269 §10(c).* Fourteen states and the District of Columbia punish possession of a machine gun by a maximum term of two years or less,** including five states which consider terms of no more than six months sufficient for the crime.*** The largest number of jurisdictions, thirty-two all told, impose maxima of ten years or less, twenty providing for a five year maximum**** and twelve imposing a seven or ten year maximum.***** Texas imposes a maximum of twenty years. With a thirty year maximum, the Missouri statute approaches the severity of the forty to fifty year sentence actually imposed here, but not that of the life sentence provided by the face of the Massachusetts statute. No other state prescribes life imprisonment for this crime.

In short, the "vast majority" of jurisdictions (forty-six) punish possession of a machine gun by no more than ten years imprisonment and only one other state statute approximates the

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* A table of the relevant statutes of the various states, the District of Columbia and the United States is included as Appendix B. The majority of the states prescribe punishments for possessing or carrying a maching gun specifically. Where noted, however, the statute punishes only the carrying of firearms generally.

** Alabama, Arizona, Colorado, Idaho, Kentucky, Maine, Mississippi, Nevada, North Carolina, Oklahoma, South Dakota, Vermont, West Virginia and Wisconsin.

*** Idaho, Kentucky, Mississippi, Oklahoma, West Virginia.

**** Alaska, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Utah and Wyoming.

***** Connecticut, Delaware, Louisiana, Maryland, Montana, New Hampshire (7), New Mexico (7), Rhode Island, South Carolina, Virginia, Washington, and the United States.

the severity of the sentences at issue here.* Massachusetts stands alone in authorizing a term of life imprisonment.

> [T]his contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence[s] in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations found to establish justice. Weems v. United States, 217 U.S. at 381.

The Supreme Judicial Court's brief reference (1981 Mass.Adv.Sh. at 2093) to "several" states whose penalties for possession of a machine gun approach the penalties at issue here hardly reflects the extreme disparity between the Massachusetts statute and the statutes of all but two other states which limit the penalty for this crime to a maximum of ten years or less. This pattern does not constitute a continuum of legislative judgments, at the high end of which Massachusetts happens to stand, but an almost universal legislative conviction that ten years or less is an appropriate punishment for simple possession of a machine gun, a uniformity of opinion which is far more substantial than a "trend" which Massachusetts, Texas and Missouri have seen

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* Two states arguably permit very long sentences for this offense. Arkansas prescribes a ten year minimum, with no maximum, for possessing a machine gun, although the felony classification statute permits no more than a five year maximum for offenses like this one, which are defined outside the criminal code. See, Ark.Stat.Ann. §§41-112(3) and 41-901(e). The California statute imposes neither a minimum nor a maximum, since California has an indeterminate sentencing system in which the maxima are, in effect, set by the parole authorities. In the series of cases beginning with In Re Lynch, supra, the California Supreme Court has ruled that the apparently permissible life sentences available for many crimes under the California system are limited by the constitutional proportionality requirement, and that correctional authorities are bound to fix a constitutionally acceptable maximum at the inception of the sentence. See In Re Rodriguez, 14 Cal.3d 639, 122 Cal.Rptr. 552, 537 P.2d 384, 393 (en banc) (1975). The Commonwealth has claimed that Montana also permits a very long sentence, but it seems clear from Mont.Rev. Codes Ann. §46-18-213, that the maximum penalty there is only ten years.

fit to buck.

The Supreme Judicial Court's opinion (1981 Mass.Adv.Sh. at 2092) also fails to reflect the extreme disparity between the sentences under the Massachusetts machine gun statute and the sentences for comparable or more serious crimes in Massachusetts. The court below does not gainsay the fact that c. 269 §10 permits punishments far more severe than those for most crimes involving completed acts of violence, although it ignores the fact that the maximum permissible sentence under M.G.L. c. 266 §102A, which punishes the directly comparable crimes of possession of an explosive device intended to destroy property or injure persons, is only ten years. The court deals with those patent disproportions simply by relying on the reasonableness of a legislative conclusion that such a severe penalty for possession might be a necessary deterrent for its use. Ibid. Quite aside from the question of why this should be true of possession of a machine gun and not true of possession of an explosive device, the exclusive reliance on deterrence or any other utilitarian purpose of punishment simply begs the question of proportionality. The question is not whether justifications for a punishment other than moral retribution can be found, but whether the punishment is out of proportion to the moral wrong done and thus unconstitutional despite its utilitarian virtues. Coker v. Georgia, 433 U.S. at 592, n. 4, holding that a sentence may be unconstitutionally disproportionate even though it serves an acceptable penological purpose.

In dealing with the patent disparity between the lesser punishments meted out in Massachusetts for similar or more serious crimes, the Supreme Judicial Court also fails to address the fact that appellant was also punished for two of those graver crimes, assault with a dangerous weapon with intent to murder (20 years) and assault and battery with a dangerous weapon (10 years). The

bizarre fact that appellant could be punished far more severely for simply holding the weapon in his hand than he could be for using it surely puts the constitutional disproportion in clear focus.

Indeed, such an inversion of the usual scale of retribution has frequently been taken as clear evidence of disproportionality, when, as here, a lesser offense is punished more harshly than the greater offense in which it is included.*

> ...[P]unishment for crimes should be graduated and proportioned to the offense. Exact balances may not be attainable between unrelated offenses, but the Constitution does not sanction the imposition of a greater punishment for a lesser included offense than lawfully may be imposed for the greater offense. Roberts v. Collins, 544 F.2d 168, 170 (4th Cir.), cert. denied, 430 U.S. 973 (1977).

Accord, Willoughby v. Phend, 301 F.Supp. 644 (N.D. Ind. 1969).** See generally, Note, 79 Col.L.Rev. at 1127 and n. 40 and 1137-1141.

In various procedural contexts and under various tests of what constitutes a lesser included offense, the courts of several states have arrived at the same conclusion -- that a greater sentence on a lesser included charge is ipso facto disproportionate to the offense committed, and, therefore, constitutes cruel and unusual punishment.*** People v. Scheuren, 10 Cal.3d

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* This aspect of the Eighth Amendment analysis is not altered by the fact that the Supreme Judicial Court in this case found that possession of a machine gun did not meet the technical standards for a lesser included offense, since it is still the case that on the facts of the case, if not under the terms of the statute per se, the possession of the weapon was a lesser offense necessarily included in the greater offenses of using it.

** In Roberts v. Collins, and Willoughby v. Phend, there was a difference of only five years between the maxima for the lesser and greater offenses.

*** In all of these cases, the defendant was sentenced only on the lesser charge, while here petitioner received the statutory maxima on the assault charges as well.

553, 111 Cal.Rptr. 129, 516 P.2d 833 (1973) (en banc) (life sentence for assault with deadly weapon unconstitutionally exceeds fourteen year penalty for assault with intent to murder [as applied, where charged and tried on greater offense]); Lee v. State, 259 Ind. 301, 286 N.E.2d 840 (1972) (sentence of ten years for entering to commit felony unconstitutionally excessive as compared to five year term provided for burglary [challenge to face of statute where only lesser charged]); Heathe v. State, 257 Ind. 345, 274 N.E.2d 697 (1971) (same); Dembowski v. State, 251 Ind. 250, 240 N.E.2d 815 (1968) (twenty-five year maximum for robbery excessive in comparison to twenty year maximum for greater offense of armed robbery [challenge to face of statute, greater offense charged]); Simms v. State, 288 Md. 712, 421 A.2d 957 (1981) (twelve year sentence for assault cannot exceed ten year maximum for assault with intent to rob [as applied, where both greater and lesser charged]); State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963) (twenty to thirty year sentence for possession of burglary tools excessive in comparison to the eight to ten year sentences for breaking and entering [challenged on its face, both offenses charged]); Application of Canon, 203 Or. 581, 281 P.2d 233 (1955) (sentence to life imprisonment for assault with intent to commit rape disproportionate in comparison to twenty year maximum for rape [challenged on its face, greater offense charged]). Cf. State v. Larsen, 44 Or.App. 643, 606 P.2d 1159 (1980) ("We decline to ascribe to the legislature the intent to punish a person more severely for the mere possession of any kind of weapon after escape than for the use of a dangerous or deadly weapon during an escape").

Since the comparison of the sentences here with those imposed in other jurisdictions for the same crime and in Massachusetts for the same or more serious crimes requires the conclusion

that the life sentence and the forty to fifty year sentences at issue in this case are both unique and extreme by contemporary standards in the United States, these punishments must be found grossly disproportionate to the offense of simple possession of a machine gun and, therefore, unconstitutionally excessive.

Even from a utilitarian viewpoint, which concerns itself with social interests rather than "just deserts" the opinion of the Court below fails to deal adequately with the relevant constitutional standard. Under Coker v. Georgia, 433 U.S. at 592, a challenged sentence which "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering" is also unconstitutionally excessive.* As Justice Brennan noted in his concurrence in Furman v. Georgia, 408 U.S. 238, at 280 (1972), "[a]lthough the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment" (footnote omitted). The question here is not whether a very severe sentence of imprisonment is justifiable as a deterrent for possession of a machine gun or in order to isolate and reform those who possess such guns from society, but whether a sentence as severe as life imprisonment or forty to fifty years serves those penal purposes any better than a sentence of ten years, which is the national norm, or even one of twenty years, which is twice

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* The role of this first of the two Coker tests of excessiveness is presumably unchanged after Rummel v. Estelle. In fact, if the Fifth Circuit's analysis is correct and the only measure of proportionality now is whether a sentence serves a substantial legislative purpose, the first Coker test may now be the only test, since evaluating proportionality only in terms of legislative goals and state interests makes the utilitarian purposes of punishment the sole criterion, to the exclusion of the question of moral or just deserts.

the national norm.* This very precise question the Supreme Judicial Court failed entirely to address, framing its opinion only in terms of whether a severe punishment generally was a rational legislative response to the crime of possession of a weapon. 1981 Mass.Adv.Sh. at 2093-2094. The court also relied on the fact that the weapon was used in a shoot-out with the police as a further (presumably retributive) justification for the sentence actually imposed, which is not appropriate, either in general (see, Terrebonne v. Blackburn, 646 F.2d at 1003 [concurring opinions of Judges Reavley, Gee, Tjoflat and Brown] noting that the constitutional inquiry compares the sentence only to the gravity of the crime charged), or in this case, where appellant also received the maximum statutory terms for the assaultive aspects of the offense, and hence, those assaults cannot justify an enhanced sentence on the possession charge.

In addition, the Supreme Judicial Court's reliance on a standard no greater than a "reasonable relation to a permissible legislative objective" (1981 Mass.Adv.Sh. at 2093) as the test of constitutional excessiveness does not do justice to the liberty interest at stake. The concern with incorrigibility identified as the state interest involved in Rummel v. Estelle, 445 U.S. at 283, was, at the very least, a substantial interest (Terrebonne v. Blackburn, 646 F.2d at 1002), and it would seem even more appropriate to require that a compelling state interest must be articulated to justify the extreme length of these sentences. Cf. Bell v.

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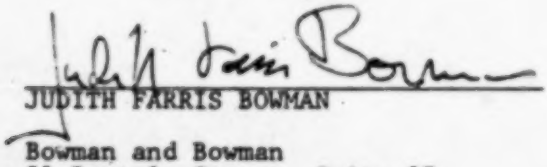
* It would seem that a comparison with the punishment imposed in other jurisdictions is also relevant in assessing the utilitarian value of a given punishment, as it seems reasonable to conclude that the utility of a punishment which is vastly in excess of that considered necessary in the overwhelming majority of other jurisdictions is simply not as obvious as the utility of the more widely adopted punishment. A legislative judgment so far out of line with that of most other states should not then be deferred to automatically.

Wolfish, 441 U.S. 520, at 535-540 (1979), holding that a compelling state interest need not be shown where a deprivation of liberty falls short of punishment.

In sum, the reasoning by which the Supreme Judicial Court reached the conclusion that the forty to fifty year sentence imposed on appellant for possession of a machine gun was not cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States exemplifies the need for this Court to clarify the standards applicable to a sentence to a term of years under the Eighth Amendment in light of the questions raised by this Court's decision in Rummel v. Estelle, 445 U.S. 263 (1980).

Respectfully submitted,

By his attorney,



JUDITH FARRIS BOWMAN

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(617) 876-3735

Dated: January 5, 1982
Cambridge, Massachusetts

APPENDIX A

FORMAL PAPERS

RICHARD A. CEPULONIS vs. COMMONWEALTH.

Suffolk. September 15, 1981. — October 8, 1981.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, NOLAN, & LYNCH, JJ.

Firearms. Constitutional Law, Cruel and unusual punishment, Duplicitous convictions, Double jeopardy, Assistance of counsel. *Practice, Criminal*, Duplicitous convictions, Double jeopardy, Assistance of counsel. *Assault and Battery*.

A sentence of forty to fifty years for unlawful possession of a machine gun did not, in the circumstances, constitute cruel and unusual punishment. [ ]

Unlawful possession of a machine gun is not a lesser included offense of assault and battery by means of a dangerous weapon. [ ]

A defendant failed to show that he was denied effective assistance of counsel at his trial and on appeal because of his attorney's failure to raise certain issues where this court found that those issues were without merit. [ ]

PETITION for a writ of error filed in the Supreme Judicial Court for the county of Suffolk on June 2, 1978.

The case was reserved and reported by *Quirico*, J.

Judith Farris Bowman for the plaintiff.

Robert M. Raciti, Assistant District Attorney, for the Commonwealth.

NOLAN, J. In 1975 the petitioner was convicted of assault with intent to murder, G. L. c. 265, § 15; assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A; and unlawful possession of a machine gun, G. L. c. 269, § 10(*c*). He appealed under G. L. c. 278, §§ 33A-33G. We took the defendant's appeal for direct review and affirmed his convictions. *Commonwealth* v. *Cepulonis*, 374 Mass. 487 (1978). Cepulonis filed a petition for a writ of error and a single justice reserved and reported the case to the full court on the joint motion of the petitioner and the Com-

monwealth. The petitioner now challenges his sentence of forty to fifty years on the possession of the machine gun charge on the ground that such a sentence constitutes cruel and unusual punishment.[1] He claims, further, that possession of a machine gun is a lesser included offense of assault and battery by means of a dangerous weapon, and that, therefore, his conviction on both charges is a violation of the prohibition against double jeopardy. Finally, the petitioner appeals all three convictions on the ground that he was denied effective assistance of counsel both at sentencing and on his prior direct appeal.

We conclude that a sentence of forty to fifty years for a violation of G. L. c. 269, § 10(*c*), does not constitute cruel and unusual punishment. Further, we hold that the petitioner was neither subjected to double jeopardy nor was he denied effective assistance of counsel. Accordingly, we affirm the judgments.

The facts are set out in our earlier opinion. *Commonwealth* v. *Cepulonis*, 374 Mass. 487 (1978). We limit our discussion here to the validity of the sentence imposed for the possession of the machine gun and the questions of double jeopardy and effective assistance of counsel.

A. *Cruel and unusual punishment.* This court has recognized that it is possible that imprisonment for a long term of years might be so disproportionate to the offense as to constitute cruel and unusual punishment.[2] *McDonald* v.

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[1] This court adjudges only whether the right of this petitioner to be free of cruel and unusual punishment has been violated in this case. See *United States* v. *Raines*, 362 U.S. 17, 21 (1960).

[2] The petitioner bases his cruel and unusual punishment challenge on both the Eighth Amendment to the United States Constitution and on art. 26 of the Massachusetts Declaration of Rights. This court has never decided whether the language of the Eighth Amendment ("nor cruel and unusual punishments inflicted") and art. 26 ("[n]o magistrate or court of law, shall . . . inflict cruel or unusual punishments") have the same meaning. *District Attorney for Suffolk Dist.* v. *Watson*, Mass. Adv. Sh. (1980) 2231, 2259 (Liacos, J., concurring). The court need not decide the question here. The United States Supreme Court has recently expressed great deference to State legislatures in their formulation of penalties for

Commonwealth, 173 Mass. 322, 328 (1899), aff'd 180 U.S. 311 (1901). *Commonwealth* v. *Jackson*, 369 Mass. 904, 909 (1976). To reach the level of cruel and unusual, the punishment must be so disproportionate to the crime that it "shocks the conscience and offends fundamental notions of human dignity." *Commonwealth* v. *Jackson*, *supra* at 910, quoting from *In re Lynch*, 8 Cal. 3d 410, 424 (1972).

The burden is on a defendant to prove such disproportion because the Legislature is given broad discretion in determining the punishment for a given offense. *Commonwealth* v. *O'Neal*, 369 Mass. 242, 248 (1975) (Tauro, C.J., concurring); *Commonwealth* v. *Jackson*, 369 Mass. 904, 909 (1976). This court has adopted a tripartite analysis to determine whether a defendant has met his burden. *Id.* at 910.

The first prong of the disproportionality test requires inquiry into the "nature of the offense and the offender in light of the degree of harm to society." *Commonwealth* v. *Jackson*, *supra*. *Opinion of the Justices*, Mass. Adv. Sh. (1979) 1781, 1792. A statute designed to protect the public from those who would illegally possess a machine gun might well be one expressing the legislative judgment that severe penalties are needed to inhibit such "gangster-type weapons." See Conference Rep. No. 1956, 90 Cong., 2d Sess., reprinted in [1968] U.S. Code Cong. & Ad. News 4426, 4434. The Legislature may well have inferred from common knowledge that the unlicensed possession of machine guns is almost always associated with the commission of violent crimes with the potential for mass killing. See *Rinzler* v. *Carson*, 262 So. 2d 661, 666 (Fla. 1972) (the machine gun

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felonies. In *Rummel* v. *Estelle*, 445 U.S. 263, 274 (1980), the Court stated: "for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative" (footnote omitted). Arguably, then, the proportionality test need not be applied with respect to the Eighth Amendment in the instant case. The sentence is so analyzed, however, because the proportionality test is still applicable under art. 26.

is in "the arsenal of the public enemy and the gangster [with which he] wars on the State"). In light of the potential for danger which the Legislature could have recognized and the rational inferences which the Legislature might have drawn, we cannot say that the petitioner has met his burden of showing that a forty to fifty year sentence for possession of a machine gun is so disproportionate to the gravity of the crime as to render the sentence unconstitutional.

The second prong of the disproportionality analysis involves a comparison between the sentence imposed here and punishments prescribed for the commission of more serious crimes in the Commonwealth. See *Opinion of the Justices*, Mass. Adv. Sh. (1979) 1781, 1792. A sentence of forty to fifty years is, of course, more severe than the penalty imposed for some crimes in the Commonwealth, and the petitioner in this case has been sentenced for a longer period than one might be sentenced for some crimes involving harm to a person. The Legislature, however, has great latitude in determining the relative seriousness of crimes and the concomitant need for deterrence. *Commonwealth* v. *Jackson*, *supra* at 915. The Legislature could have reasonably determined that a severe penalty for the unlawful possession of a machine gun was necessary to avoid the potential consequences of its use. Thus a forty to fifty year sentence for the unlawful possession of a machine gun is not constitutionally excessive.

The final prong this court examines in the disproportionality analysis is a comparison of the challenged penalty with the penalties prescribed for the same offense in other jurisdictions. Initially, we recognize that a disparity between this Commonwealth and other States may indicate no "more than different exercises of legislative judgment," rather than "a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice." *Commonwealth* v. *Jackson*, *supra* at 914, quoting from *Weems* v. *United States*, 217 U.S. 349, 381 (1910). We are aware of no other

State that imposes a forty to fifty year sentence for possession of a machine gun, but we note that there are several States in which the penalty for possession of a machine gun approaches this figure. See, e.g., Missouri (Mo. Ann. Stat. § 571.105 [Vernon 1979] — not more than thirty years); Texas (Texas Penal Code Ann. §§ 46.06, 12.33 [Vernon 1974 & Supp. 1980] — not more than 20 years). The difference between the punishment meted out in this case and that prescribed in other States is merely one of degree. It is not violative of art. 26 or of the Eighth Amendment.

The petitioner argues, further, that a sentence of forty to fifty years is excessive and unconstitutional because it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977). The standard of review in considering less than a capital sentence is "whether the statute bears a reasonable relation to a permissible legislative objective." *Commonwealth* v. *Jackson*, 369 Mass. 904, 918 (1976). This court has identified the interests served by punishment. These are (1) deterrence, (2) isolation and incapacitation, (3) retribution and moral reinforcement, and (4) reformation. *Commonwealth* v. *O'Neal*, 369 Mass. 242, 251 & n.11 (1975) (Tauro, C.J., concurring). We cannot say that the Legislature or the judge below was in error in determining that the petitioner's sentence promoted these four interests. We note that the petitioner's possession of the machine gun in this case was marked by its use first in a bank hold up and later in a shoot out with the police during which an innocent bystander was wounded. In determining the severity of the punishment, the sentencing judge violated none of the petitioner's rights by taking into consideration the circumstances of his offense.

While there may be serious debate as to the "effectiveness of harsh penalties in reducing crime," *Commonwealth* v. *Jackson*, *supra* at 913, the Legislature has not constitutionally exceeded its prerogative by authorizing the sentence the petitioner received in this case. Such a term in State

prison, furthermore, extends the petitioner's incapacitation and exacts a large measure of retribution. Finally, a legislative judgment that a severe sentence for unlawful possession of a machine gun is needed to reform the perpetrator of such a crime is not irrational. The petitioner has not met his burden of showing that his sentence is unreasonable.

B. *Double jeopardy.* Cepulonis contends that the offense of illegal possession of a machine gun is a lesser included offense of assault and battery by means of a dangerous weapon.[3] He concludes, as a consequence, that punishing him for both crimes is a violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution and of the common law prohibition of duplicitous convictions.[4]

The Commonwealth contends that a fair application of the test derived from *Morey* v. *Commonwealth*, 108 Mass. 433 (1871), establishes that unlawful possession of a machine gun is not a lesser included offense within assault and battery by means of a dangerous weapon. We agree with the Commonwealth and conclude that the petitioner was not convicted of a lesser included offense and that his conviction was not duplicitous.

The test for whether two statutory offenses may give rise to two convictions arising from a single incident is whether each crime "requires proof of an additional fact which the

[3] It is unclear whether the petitioner is also claiming that the offense of possession is a lesser included offense of assault with intent to murder. Irrespective of whether the petitioner so argued, he must fail. Assault with intent to murder is even further attenuated from possession of a machine gun than is assault and battery by means of a dangerous weapon.

[4] While this claim may be characterized as arising either under the double jeopardy clause of the Fifth Amendment to the United States Constitution or under the common law, we have ordinarily not rested decisions involving multiple convictions arising from the same event on constitutional grounds. In such cases, where at a single proceeding, a defendant has been convicted and sentenced for two offenses arising out of the same act, we have generally preferred to analyze the case under the common law *Morey* rule and have struck offending convictions as "duplicitous," rather than as violative of double jeopardy. *Commonwealth* v. *Crocker*, Mass. Adv. Sh. (1981) 1916, 1922-1923, n.8 and cases cited.

other does not . . . ." *Morey* v. *Commonwealth*, *supra* at 434. *Commonwealth* v. *Crocker*, Mass. Adv. Sh. (1981) 1916, 1929. *Kuklis* v. *Commonwealth*, 361 Mass. 302, 306-307 (1972). See *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932) (adopting this test for Federal offenses). If, then, the elements of the offenses charged require proof of a different fact, neither crime is the lesser included offense of the other. Therefore, they are not duplicitous. *Commonwealth* v. *Crocker*, *supra* at 1920-1921. *Commonwealth* v. *Jones*, Mass. Adv. Sh. (1981) 218, 224.

We turn, then, to an examination of the offenses for which the defendant was convicted, and conclude that each required evidence that the other did not. Unlawful possession of a machine gun, G. L. c. 269, § 10(*c*), requires proof that a defendant possessed a weapon, and that the weapon was a machine gun as defined in G. L. c. 140, § 121. Further, the offense requires that the petitioner fail to obtain a license to carry the weapon under G. L. c. 140, § 131. Assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A, requires neither that the weapon be a machine gun nor failure to obtain a license for the weapon. Assault and battery by means of a dangerous weapon requires an assault and a battery; unlawful possession of a machine gun does not.[5] Convictions under the two statutes thus fulfill the *Morey* requirement.

[5]The petitioner argues that, since the Commonwealth proved that the dangerous weapon was in fact a machine gun, possession of a machine gun was an element of the proof of assault and battery by means of a dangerous weapon. The petitioner's argument is misplaced. The Commonwealth need not have introduced the description of a machine gun contained in G. L. c. 140, § 121 (an element of proof needed to obtain a conviction for unlawful possession of a machine gun) to support the offense under G. L. c. 265, § 15A. The Supreme Court, construing the Federal analogue to the *Morey* test, stated that the test "focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." *Illinois* v. *Vitale*, 447 U.S. 410, 416 (1980) (construing the *Blockburger* test). We agree. As long as the proof of the elements of the offenses requires different facts, an overlap in the facts offered to establish the crimes is not significant. *Alber-*

The petitioner claims, however, that we must look beyond *Morey* to discuss whether there is a legislative intent not to punish two factually related crimes, even if the elements of the offenses are distinct under *Morey*. See *Commonwealth* v. *Jones*, *supra* at 224-225. However, as we announced in *Commonwealth* v. *Crocker*, *supra* at 1923-1924, "[i]n order to determine whether the Legislature in a given situation has authorized conviction and sentence under two statutory offenses, the *Morey* test provides a fitting rule of interpretation." The elements of the offenses, rather than the facts adduced at trial, provide the measure of whether convictions are duplicitous. Unlawful possession of a machine gun and assault and battery by means of a deadly weapon are separate offenses. The prohibition against possession of a machine gun is designed to protect the public from the use of a particularly dangerous weapon by preventing its possession before it is used. The prohibition against assault and battery by means of a dangerous weapon is designed to forestall or punish a particular type of attack. While both statutes are designed to protect against violent crime, we recognize that they further distinct legislative policies. Those policies are best expressed in the *Morey* rule. We, therefore, conclude that the petitioner's convictions for unlawful possession of a machine gun and assault and battery by means of a dangerous weapon contravene neither the double jeopardy clause nor any rule of the common law.

C. *Effective assistance of counsel*. The petitioner claims he was denied effective assistance of counsel at sentencing and on appeal. He bases his claim on the failure of his former counsel to raise or brief the cruel and unusual punishment and lesser included offense issues. Having found against the petitioner on the foregoing issues, we find no merit in his claim that his counsel exhibited "serious incom-

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nan v. *United States*, 101 S.Ct. 1137, 1142 (1981). See *Commonwealth* v. *Crocker*, *supra* at 1922; *Commonwealth* v. *Kiley*, 373 Mass. 454, 461 (1977); *Salemme* v. *Commonwealth*, 370 Mass. 421, 423 (1976).

petency, inefficiency, or inattention . . . behavior . . . falling measurably below that which might be expected from an ordinary fallible lawyer.'" *Commonwealth* v. *Saferian*, 366 Mass. 89, 96 (1974). We have found, in cases where ineffective assistance of counsel is charged, that there ought to be some showing that better work might have accomplished something material for the defense. *Commonwealth* v. *Satterfield*, 373 Mass. 109, 115 (1977). The petitioner has made no such showing here.

Judgments affirmed.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, SS.

Supreme Judicial Court
For Suffolk County
No. 78-215 Civil

Richard A. Cepulonis,
Petitioner

v.

Commonwealth of Massachusetts
Respondent

JUDGMENT

This matter came before the Court on the Respondent's motion for Entry of Judgment in accordance with the rescript of the full Court entered on November 5, 1981, and the issues having been duly heard,

It is Ordered and Adjudged, that the following entry of judgment be, and the same is, hereby made:

"Judgments Affirmed."

Dated at Boston, Massachusetts this twenty-fifth day of November, 1981.

By the Court, (Wilkins, J.)

/s/John E. Powers
Clerk

A true copy,

Attest:

Date: November 27,1981

Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

MIDDLESEX COUNTY

FALL SITTING, 1981

RECEIVED
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

No. 2395

RICHARD A. CEPULONIS,
Petitioner

DEC 21 198

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

NOTICE OF APPEAL

Notice is hereby given that RICHARD A. CEPULONIS, the petitioner in the above-captioned matter, hereby appeals the judgment entered by this Court on November 25, 1981, affirming petitioner's conviction, to the Supreme Court of the United States under 28 U.S.C. §1257(2). The appellate jurisdiction of the Supreme Court of the United States is invoked on the ground that this Court has upheld the validity of a state statute which petitioner challenged as repugnant to the Constitution of the United States.

By his attorney,

JUDITH FARRIS BOWMAN
Bowman and Bowman
51 Brattle Street, Suite 37
Cambridge, Massachusetts 02138
(617) 876-3735

A true copy
Attest
Frederick J. Swanton
Asst Clerk

Dated: December 18, 1981

APPENDIX B

STATUTORY PUNISHMENTS FOR POSSESSION OF A MACHINE GUN IN OTHER JURISDICTIONS

JURISDICTION	STATUTE	MAXIMUM POSSIBLE SENTENCE
ALABAMA	ALA.CODE, Tit. 13,§6-124	2 years (possession of shotgun or rifle)
ALASKA	ALASKA STAT. §§11.61.200(a)(3) 11.61.200(e)(1)(E) 12.55.125	5 years
ARIZONA	ARIZ.REV.STAT.ANN. §§13-3102 13-701 13-604(f)	3 years
ARKANSAS	ARK.STAT.ANN. §§41-3159, But see 41-112(3) 41-901(e)	Not less than 10 years (possession for agressive purposes)
CALIFORNIA	CAL.PENAL CODE (West) §§12220 1168	Imprisonment in State prison (term to be set by parole board)
COLORADO	COLO.REV.STAT. §§18-12-102 18-1-105	2 years (possession of an illegal weapon)
CONNECTICUT	CONN.GEN.STAT. §53-202(3)	10 years
DELAWARE	DEL.CODE ANN. Tit. 11 §§1444 4205(4)	10 years
DISTRICT OF COLUMBIA	D.C.C.E. §§22-3214 22-3215	1 year
FLORIDA	F.S.A. §790.221	5 years
GEORGIA	GA.CODE ANN. §26-2906	5 years
HAWAII	HAWAII REV.ST. §134-8	5 years
IDAHO	IDAHO CODE §§18-3302	3 months (possession of concealed deadly weapon)
ILLINOIS	ILL.ANN.STAT. (SMITH-HURD) Ch. 38, §§24-1(a)(7) 24-1(b) 1005-8-1	5 years

JURISDICTION	STATUTE	MAXIMUM POSSIBLE SENTENCE
INDIANA	IND.CODE ANN.(BURNS) §§35-23-3-1 35-50-2-6	5 years
IOWA	IOWA CODE §§724.1 724.3 902.9	5 years
KANSAS	KAN.STAT. §§21-4201(g) 21-4501(e)	5 years
KENTUCKY	KY.REV.STAT. §§527.020 527.090	6 months (carrying concealed or deadly weapon)
LOUISIANA	LA.REV.STAT. (WEST) §§40:1752 40:1755	10 years
MAINE	ME.REV.STAT. TIT.17A §1051 1252	1 year
MARYLAND	MD.CRIM.LAW CODE ANN. ART. 27 §§374 375	10 years (possession for aggressive purposes)
MICHIGAN	MICH.STAT.ANN. §28.421	5 years
MINNESOTA	MINN.STAT.ANN. §609.07	5 years
MISSISSIPPI	MISS.CODE ANN. §97-37-1	6 months
MISSOURI	MO.REV.STAT. §571.105	30 years
MONTANA	MONT.REV.CODE ANN. §45-8-304 46-18-213	10 years
NEBRASKA	NEB.REV.STAT. §§28-1203 23-105	5 years
NEVADA	NEV.REV.STAT. §§202.350 193.140	1 year (possession of concealed deadly weapon)
NEW HAMPSHIRE	N.H.REV.STAT.ANN. §§650-A:1 651:2(11)(b)	7 years (possession of a firearm in the course of a felony

JURISDICTION	STATUTE	MAXIMUM POSSIBLE SENTENCE
NEW JERSEY	N.J.STAT.ANN. §§2C:39-5 2C-43-6	5 years
NEW MEXICO	N.M.REV.STAT.ANN. §§650-A:1 651:2(II)(b)	7 years (possession of a firearm in the course of a felony
NEW YORK	N.Y.PENAL LAW (McKINNEY) §§265.02 70.00(2)(d)	5 years
NORTH CAROLINA	N.C.GEN.STAT. §§14-409 14-2(a)	2 years
NORTH DAKOTA	N.D.C.C. §§62-02-02 62-01-20 12.1-32-02	5 years
OHIO	OHIO REV.CODE ANN. (PAGE) §§2923.17 2929.11(4)	5 years
OKLAHOMA	21 OKL.STAT.ANN. §§1289.6 1289.15 1272	6 months (carrying offensive weapon)
OREGON	OREGON REV.STAT. §166.410	5 years
PENNSYLVANIA	18 PA.CONS.STAT.ANN §§902 1104	5 years
RHODE ISLAND	R.I.GEN.LAWS §§11-47-8	5 years
SOUTH CAROLINA	S.C.CODE §§16-23.230 16-23.260	10 years
SOUTH DAKOTA	S.D.CODE LAWS §§22-14-6 22-6-1(8)	2 years
TENNESSEE	TEN.CODE ANN. §39-4918	5 years
TEXAS	TEX. PENAL CODE ANN. TIT. §§46.06 (VERNON) 12.33	20 years

JURISDICTION	STATUTE	MAXIMUM POSSIBLE SENTENCE
UTAH	UTAH CODE ANN. §§76-10-504 76-3-203	5 years (concealed dangerous weapon)
VERMONT	VT.STAT.ANN. TIT. 13 §4005	5 years (carrying dangerous weapon while committing a felony)
VIRGINIA	CODE OF VA. §§18-2-290 18-2-291 18-2-10(d)	10 years
WASHINGTON	REV.CODE OF WASH. §§9.41.190 9.41.210 9.92.010	10 years
WEST VIRGINIA	W.VA.CODE §§61-7-8 61-7-9	6 months
WISCONSIN	W.S.A. §§941.26(1)+(2) 939.50	2 years
WYOMING	WYO.STAT. §6-11-101	5 years (possession of dangerous weapon)
UNITED STATES	NATIONAL FIREARMS ACT, 26 U.S.C. §§5845(1) 5861(6) 5871	10 years

Motion to Dismiss or Affirm

RECEIVED
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No. 81-6012

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1981

RICHARD A. CEPULONIS,
Appellant

v.

COMMONWEALTH OF MASSACHUSETTS,
Appellee

ON APPEAL FROM THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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No. 81-6012

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1981

RICHARD A. CEPULONIS,
Appellant

v.

COMMONWEALTH OF MASSACHUSETTS,
Appellee

ON APPEAL FROM THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

MOTION TO DISMISS OR AFFIRM

The Appellee moves this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts on the grounds that 1) no justiciable case or controversy exists within the meaning of Article III of the Constitution as to the validity of the statute on its face 2) the question presented as to the validity of the statute as applied to appellant is so unsubstantial as not to require further argument.

I.

THE STATE STATUTE INVOLVED AND
THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of Massachusetts General Laws c. 269, §10(c) which provides for an indeterminate sentence to a maximum

term of life imprisonment for the unlawful possession of a machine gun pursuant to which appellant was sentenced to a term of forty to fifty years.

B. The Proceedings Below

The proceedings below have been adequately set forth in appellants jurisdictional statement.

A. The Appellant Lacks Standing To Appeal The Maximum Term Of Life Imprisonment Of Massachusetts General Laws c. 269, §10(c)

In his appeal, the appellant challenges the validity of Massachusetts General Laws c. 269, §10(c) on its face and as applied. Appellant also raised this claim before the Supreme Judicial Court of the Commonwealth of Massachusetts. As the sentence actually imposed upon appellant for unlawful possession of a machine gun is 40 - 50 years and not the maximum term of life imprisonment, appellant does not have standing to challenge the constitutionality of the maximum term of M.G.L. c. 269, §10(c). Appellant's challenge to the constitutionality of a sentence not imposed on him does not present a justiciable case on controversy within the meaning of Article III of the United States Constitution, according to which a plaintiff must allege "'such a personal stake in the outcome of the controversy' as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490, 498-499 (1975) quoting Baker v. Carr, 369

U.S. 186, 204 (1962); Burch v. Louisianna, 441 U.S. 130, 132 n.4 (1979). If the statute as applied to appellant in the instant case is valid, appellant "[can] not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21-22 (1960); Burch v. Louisiana, supra at 132 n.4.

Appellant's challenge to the maximum term of life imprisonment under M.G.L. c. 269, §10(c) thus falls outside this Court's jurisidiction under Article III of the United States Constitution as it does not present an actual controversy upon which the Court would be capable of adjudging the legal rights of the litigants. United States v. Raines, supra at 21; Warth v. Seldin, supra at 499.

B. The Case Presents No Substantial Question Not Previously Decided By This Court

This appeal challenges the constitutionality of Massachusetts General Laws c. 269, §10(c) under which appellant was sentenced to a term of 40-50 years for unlawful possession of a machine gun. Petitioner claims that the length of the sentence violates the cruel and unusual punishment clause of the Eight Amendment in that it is unconstitutionally disproportionate to the offense charged.

The prior decisions of this Court, two terms ago in Rummel v. Estelle, 445 U.S. 263 (1980) and most

recently in Hutto v Davis, 30 Cr.L. 4159 (Journal of Proceedings January 11, 1982) explicitly foreclose the question on appeal.

In Rummel, petitioner was sentenced to a term of life imprisonment under a Texas recidivist statute that mandated a life sentence for a third felony conviction. Rummel's convictions involved the use of fraud to obtain sums of money ranging from $28.36 to $120.75 totaling less than $230.00. Petitioner challenged the statute on the same grounds asserted by appellant. This Court rejected petitioner's argument and held that, aside from death penalty cases and extreme cases manifesting extraordinarily bizarre forms of punishment,

> for crimes concededy classified and classifiable as felonies, that is, as punishably by significant term of imprisonment..., the length of the sentence actually imposed is purely a matter of legislative prerogative.

Rummel v. Estelle, supra at 274. This court stated further that as decisions made by legislatures as to relative terms of sentences for various crimes are necessarily subjective decisions based on different societal needs, they are therefore "properly within the province of legislatures and not the courts." Rummel v. Estelle, supra at 275-276. Rummel is consistent with prior decisions ruling on the judicial deference accorded to legislative decisions authorizing punishments which differ from others only in duration. Badders v. United States, 240 U.S. 391, 394 (1916); Graham v. West Virginia, 224 U.S. 616,

631 (1912); Gore v. United States, 357 U.S. 386, 393 (1958); Williams v. Oklahoma, 358 U.S. 576, 586-587 (1959) and has been reaffirmed in Hutto v. Davis, supra.

In Davis the petitioner was sentenced, pursuant to a Virginia statute, to two consecutive terms of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana. Petitioner challenged the forty year sentence on the same grounds alleged herein by appellant. This Court rejected petitioner's challenge and reiterated the holding in Rummel that this Court, as well as federal courts, "should be 'reluctan[t] to review legislatively mandated terms of imprisonment,' ... and that 'successful challenges to the proportionality of particular sentences should be exceedingly rare.'" Davis, supra at 4159 quoting Rummel v. Estelle, supra at 272, 274.

In the instant case, little, if any elaboration is needed to support the contention that the question on appeal is wholly devoid of merit in light of prior decisions of this Court. If a sentence of forty years for possession of nine ounces of marijuana and a sentence of life imprisonment for three convictions of fraud totaling less than $230.00 are not sufficient to challenge cruel and unusual punishment proscribed by the Eight Amendment, it is clear that a sentence of 40 - 50 years under M.G.L. c. 269, §10(c) for possession of a machine gun used and fired

repeatedly in an armed robbery[1/] cannot support a claim under the Eighth Amendment.

Even if the statute were susceptible to a facial challenge and even if the statute as applied does reflect "the most stringent standard found in the fifty states, that severity hardly would render [Cepulonis'] punishment 'grossly disproportionate' to his offenses." Rummel v. Estelle, supra at 281-282. Rather, it reflects the constitutionally permissible prerogative of the Massachusetts Legislature to prohibit and punish with a sentence of any term of years or life imprisonment the possession of a gangster-type weapon which is ordinarily used for criminal purposes. See, United States v. Eggebrecht, 486 F.2d 136, 137 n.2 (8th Cir. 1973); Rinzler v. Carson, 262 So.2d 661, 666 (Fla. 1972).

As the question on appeal is lacking in substantiality because it has been "explicitly foreclosed by prior decisions of [this Court] as to leave no room for real controversy," it must be dismissed on that ground. Zucht v. King, 260 U.S. 174, 176-177 (1922); Frankfurter and Lanis; The Business of the Supreme Court, 44 Harv. L. Rev. 1, 8, (1930); Brolan v. United States, 236 U.S. 216, 218 (1915); Palmer Oil v. Amerada Corporation, 343 U.S. 390, 391-392 (1952).

1/ The facts are set forth in Commonwealth v. Cepulonis, 374 Mass. 487 (1978).

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to require further argument, and Appellee respectfully moves this Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered by the Supreme Judicial Court of the Commonwealth of Massachusetts.

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